BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Audit of the Transportation Migration Rider – Part B of The East Ohio Gas Company d/b/a Dominion Energy Ohio	))))	Case No. 17-0219-GA-EXR
In the Matter of The Audit of The Uncollectible Expense Rider of The East Ohio Gas Company d/b/a Dominion Energy Ohio	)))	Case No. 17-0319-GA-UEX
In the Matter of The Audit of The Percentage of Income Payment Plan Rider of The East Ohio Gas Company d/b/a Dominion Energy Ohio	))))	Case No. 17-0419-GA-PIP

REPLY IN SUPPORT OF MOTION FOR INDEFINITE STAY OF DISCOVERY AND MEMORANDUM IN SUPPORT BY
THE EAST OHIO GAS COMPANY D/B/A DOMINION ENERGY OHIO

On July 14, 2017, The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company) filed a motion for an order indefinitely staying discovery. On July 31, the Office of the Ohio Consumers' Counsel (OCC) filed a memorandum contra. In accordance with Ohio Adm. Code 4901-1-12(B)(2), DEO now files this reply in support of its motion.

I. ARGUMENT

OCC's memorandum contra presents no reason to deny DEO's motion. OCC repeatedly mischaracterizes DEO's position and, as a result, its arguments generally prove non-responsive. When OCC finally does respond to DEO's actual argument—that discovery will be duplicative and may actually interfere with the Commission-ordered audit—it only serves to confirm DEO's point. DEO's motion should be granted.

A. DEO's request is reasonable, limited, and will not harm OCC.

For a number of years now, the Commission has ordered DEO to submit to an annual, independent financial review of the TMR-B, UEX, and PIPP riders. Each year, the review takes place, the findings are publicly filed, and interested persons are invited to comment. This year, however, before the review was even underway, OCC served DEO with numerous discovery requests that appear calculated to duplicate the financial review ordered by the Commission, to introduce new issues, or both. DEO, wishing to permit the Commission-ordered review to proceed without being subject to the distraction and additional expense of third-party discovery, asked the Commission to stay discovery in this proceeding indefinitely—not permanently, but at least until the independent accountants' report has been filed and responsive comments have been submitted.

DEO will address many of OCC's arguments below, but would begin by making clear that OCC will not be harmed by granting DEO's motion. OCC will receive whatever rights the Commission sees fit to grant in this proceeding. OCC will retain its full right to review the report and file comments, as already specified in the Commission's Entry. After that takes place, if OCC still believes that additional proceedings (including discovery) are necessary, it may request them. The Commission will certainly have the power to order additional proceedings if it believes them warranted after reviewing the report and any comments. There is nothing intrinsically time-sensitive about this case, and no opportunities will be lost to OCC if discovery is stayed.

Contrary to OCC's response, DEO is not trying to erase the Commission's discovery rules from the Administrative Code in this proceeding or in any other. DEO is merely trying to permit the independent financial review to proceed as ordered by the Commission, without having this review unilaterally transformed into litigation by OCC.

B. OCC drastically mischaracterizes the relief requested by DEO in this proceeding.

Turning to OCC's arguments, nearly all of them rely on mischaracterizations of DEO's request for relief. Rather than engage DEO's actual position, OCC invents new and overbroad ones. OCC hardly engages with the motion actually filed by DEO.

1. DEO did not ask that discovery be forbidden unless a hearing is scheduled.

OCC begins with the claim that DEO "is *presumably* arguing that discovery should not be permitted until and unless the PUCO orders an evidentiary hearing in this proceeding." (OCC Memo. at 3 (emphasis added).)

DEO's argument was written down and publicly filed, so there is no need to "presume" what that argument is. The condition that DEO asked the Commission to place on the opening of discovery was clear: if "permitted by the Commission following the submission of the independent accountants' report and the conclusion of the review and comment period." (DEO Mot. at 1.) The word "hearing" does not occur there or anywhere else in DEO's pleading, giving OCC no grounds for presuming that is DEO's argument.

So why does OCC expressly rely on this ungrounded presumption? Because other parties have made that argument and lost. OCC cites a rulemaking and other proceedings in which parties have unsuccessfully argued that discovery should be limited "to those proceedings in which a hearing had been scheduled." (OCC Memo. at 6.) But whatever the merit of that position, it is obviously not DEO's. Proving the point, in the last month, DEO *has* responded to discovery from OCC in two other cases (the demand-side-management docket, Case No. 17-1372-GA-RDR, and the Ashtabula tariff proceeding, Case No. 17-820-GA-ATA). Hearings have *not* been scheduled in either of those cases, yet DEO responded to OCC's discovery in both of them. DEO clearly does not hold the position "presumed" for it by OCC.

2. DEO's motion was appropriately presented as a motion for indefinite stay.

In keeping with its strategy of responding to motions that DEO did not file, OCC also argues that DEO failed to comply with the procedural standards for motions for protective order. According to OCC, because DEO pointed out that OCC's discovery would add costs and burdens, DEO's "motion is a motion for a protective order under a different name." (OCC Memo. at 8.) Thus, says OCC, DEO should have complied—but did not comply—with the procedural rules applicable to such motions. Among other things, OCC criticizes DEO for failing to "format" its supporting argument with the title "memorandum in support." (*Id*.)[1]

Leaving aside the formalism of OCC's argument, it is incorrect. DEO's motion does not fit within the terms of Rule 4901-1-24. The point of DEO's motion was not to entirely forbid discovery—that would have justified a request that "discovery not be had" under Ohio Adm. Code 4901-1-24(A)(1). Nor was DEO seeking to set certain boundaries applicable to how discovery would be carried out or used—as may have justified a request under the other provisions of the rule. *See id*. 4901-1-24(A)(2)–(8). What DEO was asking for was a stay of discovery until a determination as to its necessity could be made at a later point in the proceeding. That concept, and the word "stay," do not appear anywhere in Rule 4901-1-24.

The Commission clearly has not taken OCC's view that motions to stay discovery are improper unless filed as motions for protective order. The Commission has granted many such motions. For example, the Commission recently ruled that a respondent's "motion to stay further discovery should be granted" as "it would be unduly burdensome or expensive . . . to respond to further discovery requests while we conduct our investigation." *Whitt v. Nationwide Energy Partners*, 15-697-EL-CSS, 2015 WL 7567741, Entry at *5 (Nov. 18, 2015). If OCC were

[1] Even if document format were a point worth debating, OCC's critique is not actually true. DEO's pleading is captioned "Motion for Indefinite Stay of Discovery *and Memorandum in Support*." (DEO Mot. at 1.)

correct, the Commission would have rejected that motion on procedural grounds: like DEO's, it was styled as a motion for stay; like DEO's, it asserted that the burden and expense of discovery were unwarranted; and like DEO's, it pointed out that a Commission-ordered investigation was ongoing and would be interrupted by litigation. But rather than deny that motion, the Commission granted it.

Nor is this is an isolated holding. The Commission has many times granted motions for stays that were not filed as motions for protective orders. *See, e.g.*, *Wilkes v. Ohio Edison Co.*, 09-682-EL-CSS, 2009 WL 5064185, Entry at *1 (Dec. 15, 2009) ("Ohio Edison's motion to stay discovery proceedings is granted"); *In re Ameritech Comm'cns, Inc.*, Case No. 96-327-CT-ACE, 1998 WL 35464833, Entry ¶ 5 (June 5, 1998) (granting motion for stay of discovery); *OCC v. DP&L*, 84-259-EL-CSS, 1984 WL 991887, Entry at *3 (Apr. 24, 1984) ("The Commission further finds that until such time as we have considered and acted on the respondents' motions to dismiss and any replies submitted by OCC thereto, it is proper and reasonable to stay discovery in this proceeding"). Even in cases where the Commission has denied motions to stay discovery, DEO is not aware that it has denied them because they failed to comply with the procedural requirements applicable to motions for protective orders. OCC has not cited such a case.

DEO's motion was procedurally proper, as confirmed by decades of Commission practice. Renaming and refiling DEO's motion would serve no purpose, and OCC's formalism should be disregarded.

3. DEO's motion does not seek a ruling that discovery may never occur in a proceeding involving an audit or other independent review.

OCC also characterizes DEO as "clearly aim[ing] at establishing precedent that would eliminate an intervenor's right to discovery in an audit proceeding." (OCC Memo. at 3; *see also id*. at 9 (claiming that DEO argues that "discovery process for an audit proceeding should be

treated differently than any other legal proceeding").) That, again, is far broader than the argument that DEO is making.

DEO is not saying that if a case involves an audit or other independent financial review, there should be no discovery. Many cases involve both an independent review and discovery. For example, in a rate case, DEO is typically subject to an independent audit or other review, in addition to Staff's investigation. Yet DEO has never generally resisted responding to OCC's discovery in a rate case. More recently, DEO was subject to a Staff audit in its demand-side-management proceeding. OCC served DEO with discovery in that case. *See* Case No. 17-1372-GA-RDR, OCC Comments at 3 (Aug. 1, 2017) ("In an attempt to better understand the performance of [DEO's] programs . . . the Consumers' Counsel served discovery requests on [DEO]"). DEO responded to that discovery.

More to the point, in this very case, DEO is *not* saying that the independent accountants' review must necessarily and permanently displace all discovery. DEO's request is merely to *stay* discovery until the report and comments are filed, and to take the issue up then, if OCC still considers it warranted.

C. The authorities relied upon by OCC are inapplicable.

In support of its claim that discovery is necessary here and now, OCC places much weight on the Commission's comment in a rulemaking that "discovery is *sometimes* necessary to obtain sufficient information regarding an application or other pleading in order to provide substantive comments." (*Id*. at 10, quoting 11-776 Order at 23 (Jan. 22, 2014) (emphasis added).)

No one can deny that discovery is sometimes necessary. But while discovery may be necessary in other contexts, it is not needed to permit OCC's participation in this case. The independent accountants' report will be publicly filed; OCC will have an opportunity to review that report and to file comments; and the Commission has *already* made clear that "[s]uch

comments *should be limited* to the audit of these riders and the recovery of the associated costs." Entry at 6 (Apr. 19, 2017) (emphasis added). OCC does not need discovery to participate in this proceeding.

OCC also claims that granting DEO's motion would violate past precedents. None of the "precedents" that OCC suggests would be violated by granting DEO's motion apply here. One was a formal complaint; and all the others were requests by the utility for affirmative relief from the Commission. (*See* OCC Memo. at 5–6.) These cases bear no resemblance to this one.

Discovery is part and parcel of a formal complaint proceeding, particularly if reasonable grounds have been stated, but it goes without saying this is not a complaint case. Likewise, DEO recognizes that when a utility *initiates* a proceeding seeking some desired relief from the Commission, discovery should typically be permitted. Other parties generally should have the right, within reason, to understand a utility's request and to explore the facts supporting it. But again, this is not such a case.

Here, the financial review at issue has been initiated *by the Commission*. DEO is not asking for something, but being made subject to an independent review, and one that it must pay for. DEO is *not* suggesting that it should not be subject to this review or that DEO's shareholders should not pay its costs. The point is that the purpose of this proceeding is not to scrutinize a utility's request for affirmative relief, but to permit an independent financial review of DEO's riders. OCC's discovery will interfere with that purpose.

D. OCC only confirms DEO's concerns regarding facing costly, duplicative reviews.

Towards the end of its memorandum contra, OCC finally engages one of DEO's arguments in support of a stay, namely, that discovery "will duplicate the costs and burden of the annual review process already in place." (DEO Mot. at 1.) OCC's response only confirms DEO's position.

According to OCC, discovery is needed "so that [OCC] can determine, among other things, whether the audit was performed properly and whether Dominion is charging residential consumers properly." (*Id*. at 9.) OCC says "this is not duplicative." (*Id*. at 10.) But these rationales for discovery *are* duplicative.

Begin with OCC's claim that it needs discovery to determine "whether the audit was performed properly." (*Id*. at 9.) The firm selected to perform the independent financial review is Deloitte & Touche LLP, one of the world's leading auditing firms, and it will not require OCC's supervision to do its job "properly." But regardless of whether a parallel review is necessary, such a review by its stated purpose would be *redundant* to Deloitte's. Doing the *same* work that another person is doing, to make sure that other person has done his or her work properly, is by definition duplicative.

Second, OCC claims it wishes to determine "whether Dominion is charging residential consumers properly." (OCC Memo. at 9.) What OCC describes is the core purpose of the audit. The overriding purpose of the review ordered by the Commission is to verify "the accuracy of financial data" and to identify "any errors, omissions, or redundancy of costs from the calculations supporting the TMR, UEX, and PIPP rider rates." Entry at 3 (April 19, 2017). The goal is to determine whether there are "material discrepancies in DEO's calculation of the TMR, UEX, and PIPP riders." *See* 16-219 Order at 5 (Jan. 4, 2017). In addition, the procedures performed by Deloitte each year include a review of whether the rider rates have been properly applied to customer bills. *See, e.g.*, 16-219 Indep. Accountants' Report at 3 (Oct. 14, 2016) (reviewing "Application of Rider Rates") and 16-419 Indep. Accountants' Report at 3 (Oct. 14, 2016) (reviewing procedure D).

Both of OCC's stated purposes for discovery would merely duplicate the review already ordered by the Commission. This confirms that discovery, at least for the time being, should be stayed.

E. DEO did not err by failing to seek an interlocutory appeal of the April 19 procedural entry.

OCC also criticizes DEO for not filing an interlocutory appeal that argued that the April 19 Entry erred by failing to prohibit discovery from the outset. (OCC Memo. at 11.) Not surprisingly, OCC does not cite any Commission authority suggesting that this was the course DEO should have taken.

OCC's notion—that one must file an interlocutory appeal from any procedural entry that fails to predict and preemptively resolve issues that have not yet been introduced by parties who have not yet intervened—does not strike DEO as particularly realistic. Presumably the Commission and its legal department have enough to deal with without receiving requests like that. The fact that these annual reviews have come and gone for years now without any attempt by OCC or any other party to convert them into litigation would have made such a filing even stranger.

DEO has no issues with the April 19 Entry. The Company is merely trying to preserve the procedures that were established in that Entry and that have been observed for years now without issue.

F. The alleged standards for staying a Commission order are inapplicable to this request.

Finally, OCC claims that DEO does not satisfy the standards that are typically held to be applicable to granting a stay of a Commission order. As OCC acknowledges, these standards are not applicable to discovery disputes. (*See* OCC Memo. at 11.) Regardless, all of the points made by OCC in this section of its response merely duplicate points made elsewhere. DEO has already

responded to those arguments, and there is no need to repeat everything under a different heading.

DEO typically responds to discovery without involving the Commission. But in these circumstances, DEO believes that discovery will interfere with and distract from the independent review ordered by the Commission. If the Commission believes otherwise, DEO will comply with its decision.

II. CONCLUSION

For the foregoing reasons, DEO respectfully requests that the Commission issue an order indefinitely staying discovery, unless later authorized under the conditions explained in its original motion.

Dated: August 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by electronic mail to the following persons this 7th day of August, 2017:

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Summary: Reply in Support of Motion for Indefinite Stay of Discovery and Memorandum in Support electronically filed by Ms. Rebekah J. Glover on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio